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18
 19 IN THE UNITED STATES DISTRICT COURT
 20
 21 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 22
 23 SAN FRANCISCO DIVISION

24
 25 **DERRECK E. SUNDERLAND,**

26 Petitioner,

27 v.

28 **JAMES D. HARTLEY, Acting Warden,**

29 Respondent.

30 07-05345 CRB

31 **RESPONDENT'S NOTICE OF
 32 MOTION AND MOTION TO
 33 DISMISS; SUPPORTING
 34 MEMORANDUM OF POINTS
 35 AND AUTHORITIES**

36 Judge: The Honorable
 37 Charles R. Breyer

38
 39 **TO PETITIONER DERRECK SUNDERLAND, IN PRO PER:**

40
 41 **PLEASE TAKE NOTICE** that pursuant to 28 U.S.C. § 2254 and Rule 4 of the Rules

42 Governing § 2254 Cases in the United States District Courts, Respondent^{1/} moves the Court for

43
 44
 45 1. The proper respondent in this action is Acting Warden James D. Hartley, not Warden
 46 Dawson as alleged in Sunderland's petition. *Stanley v. Cal. Supreme Court*, 21 F.3d 359, 360 (9th
 47 Cir. 1994) (holding that the warden where the petitioner is incarcerated is the proper respondent);
 48 Rule 2(a), 28 U.S.C. § 2254. Because the actions complained of in this petition concern a parole
 49 consideration hearing, the Board of Parole Hearings is used interchangeably with Respondent in this
 50 Motion to Dismiss and supporting Memorandum of Points and Authorities for convenience only.

1 an order dismissing the above-entitled action on the ground that Petitioner Derreck E.
 2 Sunderland's Petition is moot because he has received a subsequent parole consideration hearing
 3 that comports with due process. Sunderland's Petition should also be dismissed as to his claim
 4 challenging his plea agreement on the ground that the Petition is successive, and Sunderland
 5 failed to obtain an appellate order authorizing the Court to consider his claim. Finally, the
 6 Petition should be dismissed because it does not allege a federal question.

7 This motion is based on the notice and motion; the supporting memorandum of points and
 8 authorities and exhibits; and the pleadings, records, and files in this action.

9 MEMORANDUM OF POINTS AND AUTHORITIES

10 INTRODUCTION

11 Petitioner Derreck Sunderland, a California state prisoner, brings this federal habeas petition
 12 challenging the Board of Parole Hearings' alleged failure to conduct a timely subsequent parole
 13 consideration hearing after the Board denied him parole for three years in 2003. (Petn. at 12-18.)
 14 He also alleges that the Board's failure to hold a timely parole hearing violated his plea
 15 agreement and deprived him of due process. (*Id.*) This Court should dismiss the Petition as
 16 moot because Sunderland has received a subsequent parole consideration hearing that comports
 17 with due process. Moreover, as to Sunderland's challenge to his plea agreement, his claim
 18 should be dismissed because it is a successive petition, and Sunderland failed to obtain an
 19 appellate order authorizing the Court to consider his claim. Finally, his Petition should be denied
 20 because his allegations involve questions of state law and do not entitle him to federal habeas
 21 relief.

22 STATEMENT OF RELEVANT FACTS

23 Sunderland is lawfully in the custody of the California Department of Corrections and
 24 Rehabilitation after he pled no contest to second degree murder with an enhancement for the use
 25 of a knife. (Ex. A, Abstract of Judg.) Sunderland was sentenced to an indeterminate sentence of
 26 sixteen years to life in October 1983. (*Id.*)

27 On July 9, 2003, Sunderland appeared before the Board for a subsequent parole
 28 consideration hearing. (Ex. B, Parole Consideration Proposed Decision.) The Board found him

1 unsuitable for parole and denied him parole for three years. (*Id.*) Sunderland is challenging the
 2 Board's 2003 decision as violating his plea agreement in a separate decision. *Sunderland v.*
 3 *Mendoza -Powers*, Case No. 1:06-cv-00999-LJO-TAG.

4 In August 2006, Sunderland requested information regarding his 2006 parole consideration
 5 hearing, but was told that the hearing had been postponed indefinitely due to a backlog of parole
 6 hearings. (Petn. at 10.) Sunderland then filed a petition in the Sierra County Superior Court
 7 alleging that the Board was violating his due process rights by failing to hold a timely parole
 8 consideration hearing and that the failure was also depriving him of the benefit of his plea
 9 agreement. (Ex. C, Sierra County Sup. Crt. Petn. & Order.)² The superior court denied
 10 Sunderland's petition, finding that the court had previously rejected Sunderland's numerous
 11 challenges to his plea agreement (Ex. C; Petn. at Ex. 1) and that Sunderland had received his
 12 parole consideration hearing on October 3, 2006. (Ex. C.)

13 Yet, Sunderland's October 3, 2006 parole hearing did not occur. (Ex. D, Life Prisoner
 14 Hearing Decision Face Sheet; Ex. E, Life Prisoner Hearing — Extraordinary Action and
 15 Decision.) On the day of the hearing, the Board determined that, because Sunderland's previous
 16 psychological evaluation was unfavorable and had been completed in 1999, Sunderland's hearing
 17 should be postponed to obtain a new evaluation. (*Id.*) Accordingly, the Board deferred
 18 Sunderland's hearing for six months or placed him on the first hearing calendar after his
 19 psychological report was completed. (Ex. E.)

20 Because his parole hearing was postponed, Sunderland filed a new petition in the First
 21 District Court of Appeal alleging the same claims as in his superior court petition, adding only
 22 that the superior court erred in finding that his parole consideration hearing had already occurred.
 23 (Ex. F, Court of Appeal Petn. & Order.) The appellate court denied his petition on March 8,
 24 2007, and the California Supreme Court denied his petition for review on May 9, 2007. (Ex. F;
 25 Ex. G, California Supreme Court Order.)

26
 27 2. To avoid repetition and unnecessary volume, the exhibits attached to Sunderland's state
 28 court petitions have been removed. Respondent will provide these documents upon the Court's
 request.

1 Sunderland received his subsequent parole consideration hearing on May 23, 2007. (Ex. H,
 2 Parole Consideration Proposed Decision.)

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4

5 **ARGUMENT**

6 **I.**

7 **SUNDERLAND'S PETITION SHOULD BE DISMISSED AS MOOT
 8 BECAUSE HE RECEIVED HIS SUBSEQUENT PAROLE
 9 CONSIDERATION HEARING.**

10 This Court must dismiss Sunderland's Petition because it is moot. A claim is moot and the
 11 court is divested of its jurisdiction if a case or controversy no longer exists pursuant to Article III
 12 of the Constitution. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). In other words, if the
 13 claim is no longer a present, live controversy for which effective relief can be granted, the claim
 14 is moot. *Id.* Here, Sunderland's claims are predicated on the Board's alleged failure to provide
 15 him with a timely subsequent parole consideration hearing. (Petn. at 12-18.) But because
 16 Sunderland received his parole hearing on May 23, 2007 (Ex. H), his petition should be
 17 dismissed as moot. (See e.g., Ex. C.) Indeed, he has received the only effective relief that he can
 18 be granted — a new parole hearing that comports with due process. See e.g., *In re Rosenkrantz*,
 19 29 Cal.4th at 658 [if no evidence supports Board's decision to deny inmate parole, court should
 20 order the Board to vacate its decision denying parole and thereafter to proceed in accordance with
 21 due process of law]; *Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 984-85 (9th Cir. 2002) (parole
 22 board must exercise discretion in determining whether an inmate is suitable for parole).
 23 Accordingly, Sunderland's petition should be dismissed.

24 **II.**

25 **BECAUSE SUNDERLAND DID NOT OBTAIN AN APPELLATE ORDER
 26 AUTHORIZING THIS COURT TO CONSIDER HIS SUCCESSIVE
 27 PETITION, THE PETITION MUST BE DISMISSED.**

28 Under 28 U.S.C. § 2244(b)(3)(A), an inmate filing a second or successive petition for
 29 writ of habeas corpus must first move the appropriate court of appeals for an order authorizing
 the district court to consider the application. In other words, Sunderland must obtain leave from

1 the Ninth Circuit before filing a second or successive petition in a district court. *Gonzalez v.*
 2 *Crosby*, 545 U.S. 524, 529 (2005).

3 In his Eastern District petition, Sunderland is challenging the Board's 2003 decision
 4 denying him parole as violating his plea agreement. (*Sunderland v. Mendoza -Powers*, Case No.
 5 1:06-cv-00999-LJO-TAG; Petn. at 16.) Here, the basic thrust of Sunderland's legal claim is to
 6 again challenge the validity of his plea agreement. (*See generally*, Petn.)^{3/} Thus, Sunderland was
 7 required to obtain leave from the Ninth Circuit before bringing his successive petition before this
 8 Court. 28 U.S.C. § 2244(b)(3)(A); *see also Gonzalez*, 545 U.S. at 529. As the record indicates
 9 no such order, the Court must dismiss the petition. *Id.*

10 **III.**

11 **SUNDERLAND'S PETITION SHOULD BE DISMISSED BECAUSE**
 12 **FEDERAL HABEAS RELIEF IS NOT AVAILABLE FOR STATE LAW**
 13 **ISSUES.**

14 This Court cannot grant relief for Sunderland's claims because they are based on state —
 15 not federal — law. Federal habeas relief is available only to persons in custody for violations of
 16 federal law or the federal Constitution. 28 U.S.C. § 2254(a).

17 Here, Sunderland's Petition challenges the construction of state statutes and regulations
 18 regarding the manner in which the Board conducts parole suitability hearings. Indeed,
 19 Sunderland's complaint is already being heard as a state-action in *In re Rutherford*, where the
 20 Marin County Superior Court has jurisdiction over all overdue parole consideration hearings. (*In*
 21 *re Rutherford*, Super. Ct. Marin County, 2004, No. SC135399A.) As such, Sunderland's claims
 22 are predicated on state law and not cognizable in federal habeas corpus. 28 U.S.C. § 2254(a);
 23 *Rose v. Hedges*, 423 U.S. 19, 21 (1975); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197-1198 (9th Cir.
 24 1983); *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996) (habeas petition may not transform
 25 a state law issue into a federal one merely by asserting a due process violation). Even if

26
 27 3. Similarly, the state courts have repeatedly rejected Sunderland's challenges to his plea
 28 agreement. (Ex. C; Petn. at Ex. 1; *see In re Clark* (1993) 5 Cal.4th 750, 767.)

1 Sunderland is alleging that the state court erroneously rejected these claims, a federal court may
2 not challenge a state court's interpretation or application of state law, *Middleton v. Cupp*, 768
3 F.2d 1083, 1085 (9th Cir. 1985), or grant relief "on the basis of a perceived error of state law."
4 *Pulley v. Harris*, 465 U.S. 37, 41 (1984). Accordingly, because Sunderland's Petition fails to
5 allege a federal question, it should be dismissed.

6 **CONCLUSION**

7 This Court should dismiss Sunderland's Petition because he has received a subsequent
8 parole consideration hearing that comports with due process. Moreover, Sunderland failed to
9 obtain leave from the Ninth Circuit Court of Appeals to file a successive petition. Finally,
10 Sunderland's Petition should be dismissed because his claims are predicated on state law and do
11 not entitle him to federal habeas relief. Accordingly, Sunderland's Petition should be dismissed.

12 Dated: April 9, 2008

13 Respectfully submitted,

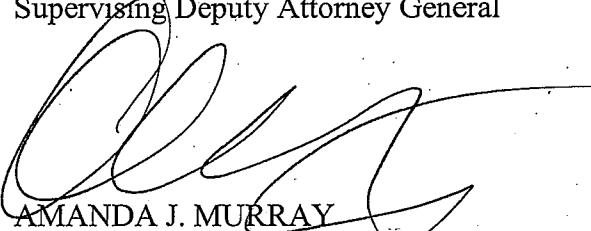
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Sunderland v. Hartley**

No.: **07-05345 CRB**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 9, 2008, I served the attached

**RESPONDENT'S NOTICE OF MOTION AND MOTION TO DISMISS;
SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**Derreck Sunderland, C-84327
Avenal State Prison
P.O. Box 9
550-2-40U
Avenal, CA 93204
in pro per**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **April 9, 2008**, at San Francisco, California.

M.M. Argarin

Declarant

M.M. Argarin

Signature